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SUPREME COURT, U.S.

NO. 81-6151

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, TERM, 1981

JAMES CUNNINGHAM, JR.,

Petitioner

vs.

STATE OF GEORGIA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE GEORGIA SUPREME COURT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Has petitioner, who under Georgia law waived any issue regarding the composition of the grand jury which indicted him, shown that he was actually prejudiced by its allegedly unconstitutional composition?

2. Has petitioner demonstrated that the traverse jury which convicted and sentenced him was unconstitutionally composed?

3. Did the trial court commit constitutional error in denying petitioner's motion for funds to hire a private investigator?

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STATEMENT OF THE CASE

A. PROCEEDINGS IN THE COURTS BELOW

During the January, 1979 term of the Superior Court of Lincoln County, Georgia, petitioner, James Cunningham, Jr., was indicted in three counts for burglarizing the home of William B. "Foots" Crawford, committing an armed robbery against Mr. Crawford, and for murdering Mr. Crawford. The indictment alleged that petitioner committed these offenses on January 1, 1979. (R.3-4). Petitioner was tried on this indictment before a jury in the Lincoln County Superior Court on October 23-25, 1979. At the close of the evidence, the State entered a nolle prosequi to the burglary charge. (T. 317; R.4). After deliberating less than an hour the jury returned guilty verdicts against petitioner on both the armed robbery and murder counts. (T. 365; R.4). After hearing additional evidence regarding sentence, the jury fixed petitioner's punishment at death. (T. 432). The Georgia Supreme Court affirmed petitioner's convictions and sentences on appeal. Cunningham v. State, ___ Ga. ___, 284 S.E.2d 390 (Nov. 13, 1981). The court denied a rehearing on December 1, 1981.

B. STATEMENT OF FACTS

The State's evidence showed that petitioner planned and carried out the armed robbery and murder of William Crawford. Petitioner and his wife, Emma Cunningham, planned to rob the victim before going to the latter's house. (T. 263-64). To aid in their criminal plans, petitioner and his wife took along a wrench. (T. 226, 263-64, 285). Petitioner and his wife were seen in the neighborhood of the victim's house around the time

of the crimes, 6:00-9:00 p.m., January 1, 1979. (T. 123-24, 175-77, 182-84). The victim, who apparently operated a store in his home, knew petitioner and his wife and let them into his house. (T. 126-27, 211-12, 226, 257). Petitioner asked for some Winston cigarettes and when the victim bent down to get them, petitioner hit him with the wrench. When this blow failed to subdue the victim, petitioner bludgeoned him repeatedly with the wrench. (T. 226, 257-58). According to Dr. Larry Howard of the State Crime Laboratory, the victim was struck at least 18 times. Some of the blows broke both of the victim's arms as he tried to defend himself by covering his head with his arms, one blow shattered his eyeglasses, and at least eight of the blows to his head were capable of causing death. (T.148-53, 281). The victim's body, arms, and especially head were "completely covered with blood." (T. 131). His horrible wounds are graphically depicted in State's Exhibits 1-4 and 17-22.

After brutally beating the victim, who, according to petitioner, was still alive (T. 258, 285, 391), petitioner and his wife went into the victim's bedroom and took his pocketbook from under the bed where they knew he kept his money. (T. 212, 226, 258). Petitioner and his wife then fled the scene. Petitioner threw his bloody wrench into a field (T. 212, 258) and his gory clothes and the victim's now-empty pocketbook down an abandoned well. (T. 261, 275). With some of the $330 they found in the victim's pocketbook, petitioner and his wife that same night paid a friend to take them to Augusta, Georgia and there purchased one-way bus tickets to Newark, New Jersey. (T. 192-93, 197-98). The friend who had taken the Cunninghams to Augusta became suspicious when he learned of the murder of Mr. Crawford; he then informed the local sheriff. (T. 193-94). The sheriff contacted the Durham, North Caroline Police

Department and asked that petitioner be detained when the bus he was on stopped there. Detective R. P. Franklin of the Durham Police Department took petitioner into custody at the bus station in Durham at about 11:00 a.m., January 2, 1979. (T. 200-202).

Petitioner made a written confession to Detective Franklin, and later two oral confessions to Georgia Bureau of Investigation Agents Mike Seigler and Jim Carver. All of these confessions were admitted into evidence. (T. 225-28, 269-77, 283-86). Petitioner also led the GBI Agents to the wrench and the abandoned well where he had disposed of his clothes and the victim's pocketbook. (T. 275-80).

Petitioner did not testify and offered no evidence in the guilty phase of his trial. (T. 307-8, 312-13). In the sentencing phase of his trial, petitioner himself testified and offered evidence of his character before the murder. (T. 375-83).

SUMMARY OF ARGUMENT

By failing to challenge the array of the grand jury before indictment, petitioner waived any issue as to the constitutionality of its composition. With regard to the traverse jury, petitioner failed to support his challenge with a prima facie case. Specifically, he failed to show that the representation of women and blacks on the traverse jury list was "not fair and reasonable in relation to the number of such persons in the community." Duren v. Missouri, 439 U.S. 357, 364 (1979). Also, he failed to show that the under-representation was due to the "systematic exclusion of the group[s] in the jury-selection process." Id. Thus his challenge to the array of the traverse jury was properly denied. Finally, petitioner's motion for funds to hire a private investigator was properly denied because petitioner has failed to show that he was in any way harmed or prejudiced by the denial.

ARGUMENT

A. COMPOSITION OF GRAND JURY

Petitioner attacks the composition of the grand jury that indicted him. He contends that blacks and women were unconstitutionally underrepresented on the jury list from the grand jury was drawn.

However, petitioner waived this issue by failing to raise it before indictment. Under Georgia law, a challenge to the array of a grand jury must be made before indictment unless the defendant is able to show that at the time of indictment he had neither actual nor constructive knowledge of the composition of the grand jury. Otherwise, a defendant waives the issue. Sullivan v. State, 246 Ga. 426, 427 (1980); Godfrey v. State, 243 Ga. 302, 305 (1979), rev'd in part on other grnds, 446 U.S. 420 (1980); Sanders v. State, 235 Ga. 425, 426 (1975). Petitioner was indicted on January 22, 1979, but did not challenge the composition of the grand jury until October 22, 1979, one day before his trial.

Unlike petitioner's contention, the Georgia Supreme Court did not excuse this procedural default by reaching the merits of his complaint. Rather, that court clearly based its decision on this issue on petitioner's waiver. The Georgia court went on to hold that with regard to petitioner's challenge to the array of the traverse jury, he had failed to establish a prima facie case. Cunningham, supra, at 392-93. cf. Coleman v. Alabama, 377 U.S. 129 (1964) (despite procedural default, the lower court's judgment "'rested'" upon its decision on the merits).

Unless one who has waived his challenge to the composition of a jury can show that he has suffered actual prejudice, he is not entitled to federal relief. Francis v. Henderson, 429 U.S. 536 (1976). Petitioner has not suggested that he was actually prejudiced by the composition of the grand jury.

For these reasons, then, the Court should not grant certiorari on this issue.

B. COMPOSITION OF TRAVERSE JURY

Petitioner also claims that the traverse jury that convicted and sentenced him to death was drawn from an unconstitutionally composed jury list. Petitioner contends that the traverse jury list was composed in violation of both the Sixth and Fourteenth Amendments.

In order to prevail on a Sixth Amendment challenge to the composition of a jury list, one must establish a prima facie case consisting of three elements. In the Court's words:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364(1979).

The first element of a prima facie case was met by petitioner's challenge. Women and blacks are, of course, distinctive community groups within the meaning of Duren. Swain v. Alabama, 380 U.S. 202 (1965); Taylor v. Louisiana, 459 U.S. 522 (1975).

Petitioner failed, however, to establish the second part of a prima facie case. Two points should be made in this regard. First, petitioner has exaggerated the under-representation of blacks and women on the Lincoln County traverse jury list. Assuming the accuracy of petitioner's figures, the absolute disparity between the general population and the jury list was 16.83% for women and 15.52% for blacks. He has calculated the under-representation by the "comparative disparity standard" at 35.82% for blacks and 33.09% for women. (Pet. Br. at 9). Yet in his citation of other cases decided by this Court, petitioner mentions only the absolute percentile disparities. E.g., 23%, Turner v. Fouche, 396 U.S. 346, 359 (1969); and 33%, Carter v. Jury Commission of Greene County, 396 U.S. 320, 327-28 (1970). Petitioner misleadingly compares the under-representation by the comparative method in the instant case with the absolute disparity in the cases he cites. Moreover, petitioner is careful not to mention that the absolute disparity in Casteneda v. Partida, 430 U.S. 482, 495 (1977), which he cites repeatedly for other points, was 40% -- far greater than the percentages found in the instant case. Clearly, the under-representation of blacks and women in the instant case is not nearly so great as in the typical case in which a prima facie showing has been made. Second, petitioner has failed to establish the second part of a prima facie case because he has not shown the percentages of women and blacks in the general population of Lincoln County which are eligible for jury service. He has not shown what percentages are of voting age, without a conviction for a crime involving moral turpitude, and meet the other qualifications for jury service. Ga. Code Ann. §§ 59-201, 701. For these reasons, petitioner has failed to show that the representation of women and blacks "in venires from which juries

are selected is not fair and reasonable in relation to the number of such persons in the community." Duren, supra, at 364. See United States v. Apodaca, 666 F.2d 89, 93 (5th Cir. 1982) (prima facie case not shown because percentages eligible for jury service not established).

Finally, petitioner has also failed to establish the third part of a prima facie case--that the "underrepresentation is due to systematic exclusion of the group in the jury-selection process." Duren, supra, at 364. In other cases in which the Court found prima facie cases of unconstitutional jury composition, statistics have been presented showing underrepresentation over extended periods of time. Carter, supra at 327-28 (blacks under-represented 1961-67); Castaneda, supra, at 495-96 (Mexican-Americans under-represented over 11 year period). Yet, in the instant case, petitioner has shown underrepresentation on only one Lincoln County jury list. This clearly falls short of the required showing of "systematic exclusion." Furthermore, unlike in many other cases in which the Court has recognized prima facie cases, the jury selection procedure employed in the instant case was entirely objective and facially non-discriminatory. The traverse jury list was chosen, as was required under a federal district court order, by the random selection of every fifth name on the registered voters' list. It is instructive to compare the "highly subjective" method employed in Castaneda, supra, at 497, which the Court found to support the prima facie case. The Court said, "[A] selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing." Id., at 494.

To the extent that petitioner states an equal protection claim, it is successfully rebutted by evidence of good faith efforts to compose a jury list made up of a fair cross-section of the eligible population and evidence of the absence of any discriminatory purpose. The Court has held that such rebuttal evidence is significant for refuting an equal protection challenge to the composition of a jury. Duren, supra, at 368, n.26, and cases cited therein. The stipulation at trial that the federal district court order was faithfully followed clearly demonstrates good faith and the absence of discriminatory purposes.

For all of these reasons, the Court should deny certiorari on this issue.

C. MOTION FOR FUNDS TO HIRE A PRIVATE INVESTIGATOR

Petitioner also contends that his motion for funds to hire a private investigator was denied in violation of his Sixth and Fourteenth Amendment rights. He admits that the Georgia Supreme Court correctly described the case against him as "factually simple" and non-technical. Cunningham, supra, at 393. (Pet. Br. at 13-14). Yet, petitioner claims that the provision of state monies may have led in unforseeable ways to the development of defense evidence. Petitioner's real position is, then, that state monies should be provided to all indigents for investigation. This is true because in all cases further investigation might lead to evidence helpful to the defense.

But, there is no general requirement that funds for investigation be provided to indigents. In Hoback v. Alabama, 607 F.2d 680 (5th Cir. 1979), for example, the Fifth Circuit held that, although a case probably would arise in which the

State was constitutionally required to provide expert assistance to a defendant, the appellant had not shown that his constitutional rights were denied. The court reasoned that even if a fingerprint expert had testified in the manner suggested by appellant the outcome of the trial would have been the same. Id., at 682-83. In Mason v. Arizona, 504 F.2d 1345 (9th Cir. 1974), the Ninth Circuit held that investigative assistance to an indigent defendant "is not automatically mandatory but rather depends upon the need as revealed by the facts and circumstances of each case." Id., at 1352. The court went on to hold that in order to show that the denial of investigative assistance has violated his due process or equal protection rights. an indigent must show by clear and convincing evidence that he has been substantially prejudiced. Georgia law is not inconsistent: The provision to an indigent of funds for investigative help or expert assistance is a matter of discretion for which a court will not be reversed absent abuse. Whitaker v. State, 246 Ga. 163 (1980); Westbrook v. State, 242 Ga. 151, 153 (1978), cert. denied, 439 U.S. 1102.

Petitioner has not shown that he was harmed in any manner by the denial of his motion for funds. The best he can do is speculate that evidence, primarily impeaching, might have been developed. He has thus failed to show that the outcome of his trial would have been affected, that he was substantially prejudiced, or that the trial court abused its discretion.

For these reasons the petition for certiorari should not be granted on this issue.

CONCLUSION

The instant petition should not be granted because the Supreme Court of Georgia has not "decided a federal question in a way in conflict with applicable decisions of this Court" nor do any other "special and important reasons" militate in favor of review. S. Ct. Rules 17.

Respectfully submitted,

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